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**Issue Date: 30 March 2005**

CASE NO. 2004-LHC-0085

OWCP NO. 18-78064
*In the Matter of:*

**DEBORAH MOSS**,
Claimant,

vs.

**MAERSK PACIFIC**
Employer,

and

**COMMERCIAL INSURANCE SERVICE**,
Carrier.

Appearances:

*Cory A. Birnberg, Esq.*
*San Francisco, California*

For the Claimant

*Phil Walker, Esq.*
*San Francisco, California*

For the Employer

Before: *Judge Gerald M. Etchingham*
*Administrative Law Judge*

## DECISION AND ORDER AWARDING BENEFITS

This claim arises under the Longshore and Harbor Worker's Compensation Act, as amended (hereinafter the "Act" or the "Longshore Act"), 33 U.S.C. Section 901 *et seq*. Formal hearings were held in San Francisco, California on January 23, January 27, and October 13, 2004.

The following exhibits were admitted into evidence at hearing: Claimant's exhibits ("CX") 1, 2,5-23, 25, 29-35, and 39-42, Employer's exhibits ("EX") 2, 4-6, 8, 10, 15, 17 but

withdrawing pages 52-54 therein, 19, 20, 24, 25, 28, and 33 and Administrative Law Judges exhibits ("ALJX") 1-13 admitted into evidence at hearing and ALJX 14 and ALJX 15 consisting of the two closing briefs of Claimant and Employer, respectively, filed December 22, 2004, thereby closing the record. TR at 28-46, 193-195, and 281-284.[1]

Stipulations:
The parties agreed to the following stipulations:

1. Claimant was injured in Long Beach, California on April 15, 2002;
2. Disability commenced on April 16, 2002;
3. Claimant became aware that her disability was work-related on April 15, 2002, which was the same date that Employer had notice of the injury;
4. This claim is for compensation and medical benefits;
5. Claimant and Employer were in an employer-employee relationship at the time the injury occurred;
6. The injury sustained arose out of and in the course of Claimant's employment;
7. Claimant filed a timely claim for compensation;
8. The parties are subject to the Act;
9. Employer paid Claimant temporary total disability from April 16, 2002 through July 3, 2002 at a weekly rate of $966.08.
10. $966.08 is the maximum weekly rate for the purposes of temporary total disability;
11. Claimant returned to work on October 26, 2003;
12. Employer is not currently providing compensation and medical benefits;

Issues in Dispute:

Claimant is seeking temporary total disability from April 16, 2002 through October 26, 2003 at the average weekly wage of $1550.09. Employer paid Claimant temporary total disability from April 16, 2002 through July 3, 2002 at the maximum weekly compensation rate of $966.08. Claimant alleges she did not reach maximum medical improvement ("MMI") by October 26, 2003. Dr. Meyers, one of Claimant's treating physicians, opined that Claimant reached MMI on December 10, 2003. Employer argues that if the opinion of one of its independent medical evaluators ("IMEs"), Dr. Sturtz, is found credible, then no additional temporary disability payments are warranted after July 3, 2002 since Claimant reached MMI a few days after the accident. In the alternative, Employer argues that if its second IME's, Dr. Ansel's, opinion is followed then Claimant reached MMI on September 9, 2002. Claimant is also seeking to hold Employer responsible for her outstanding medical bills to Dr. Meyers in the amount of $4,214.44 and a physical therapy bill in the amount of $5,114.34.

1. Did Claimant reach MMI, and if so, when did she reach MMI?
2. What is the nature and extent of Claimant's disability for the period of July 4, 2002 through the present?
3. What portion of Claimant's medical expenses is Employer liable to pay?

[1] The abbreviation "TR" refers to the hearing transcript.

## FACTUAL FINDINGS AND CONCLUSIONS OF LAW

Claimant was born on September 24, 1954. She is the divorced mother of three. From 1978 to 1998, Claimant worked for the United States Postal Office as a letter carrier. CX 6, p. 68. In 1989, Claimant started doing longshore work part-time as an Identified Casual. She began to do longshore work full-time in 1998 in Oakland, California. TR at 206.

On June 6, 1992 Claimant was beaten in the face. EX 17, p. 35. The medical report noted that she had "gradually increasing neck pain" and a "cervical sprain." EX 17, p. 35. The radiological report indicated that there was no evidence of a cervical fracture, dislocation or subluxation. EX 17, p. 37.

On March 8, 1993, Claimant injured herself while working as a letter carrier. She listed "lower back" as one of her two primary complaints. EX 17, p. 40. The physical therapist's objective finding regarding Claimant's lower back was that "ROM [Range of Motion] at PT's [Patient's] baseline. Pain at end range ext [extension]." EX 17, p. 44.

On May 5, 1994, Claimant injured her left hand with strain of the collateral ligament of the middle finger at work, which required her to be off work for more than a year. EX 17, p. 50.

On January 10, 1998, Claimant filed a Notice of Traumatic Injury and Claim for Compensation for back, hip, and knee injuries that she attributed to her being chased by a dog onto the hood of her vehicle on the same day. Dr. Meyers, at that time, diagnosed Claimant with a lumbar strain and the claim was accepted for a lumbar strain. Claimant later complained of pain in cervical spine. EX 19, p. 82. Claimant stopped working with the Postal Service on January 10, 1998 and received temporary total disability for intermittent periods of wage loss. EX 19 at 119.

The April 15, 2002 injury at issue here occurred while Claimant was working as a UTR driver with Employer Maersk Pacific in Long Beach, California. Claimant was operating a bomb cart that was connected to a truck when a loaded container fell onto the back of the bomb cart. She claimed that the top pick container malfunctioned thus dropping a loaded container approximately 8 feet. TR at 214-215. She estimated the container was 40 feet long and weighed 8 to 10 tons. *Id*. Claimant's Superintendent, Kwang Chen, testified that the lack of damage to the bomb cart indicated that the container did not fall 10 feet. TR at 124-125. He said the container and bomb cart looked normal. TR at 117-118.

Claimant alleges that the container falling onto the bomb cart knocked her about, causing her to strike her head and left arm and her bottom was thrust into the back of the seat. Claimant does not recall ever wearing a seatbelt while operating a UTR in Long Beach. TR at 270. The policy in Long Beach was that an operator operating moving equipment were required to be wearing the proper restraints and that all of Employer's UTRs were equipped with seat belts on the day of the accident. TR at 125-26.

Claimant worked for an hour or two following the accident. Claimant alleged she then started feeling "tight" yet she did not take any medications the day of the accident. TR at 225-26.

Claimant testified that she tried to fill out an accident report, but that Sal, the walking boss, told her not to fill out a report because the top handler would get in trouble. TR at 222-223. Claimant then saw Mr. Chen who told her to take the rest of the day off, and that if she did not feel well the next day, he would have the medical authorization papers ready for her. TR at 224. Mr. Chen credibly denied saying that he recommended that Claimant not file an accident report on the night of her accident to avoid an OSHA investigation. TR at 320. Mr. Chen also denied that the top handler would have gotten in trouble if the machine malfunctioned. He said that if the accident was the top handler operator's fault, he would have gotten paid for the time worked and that mechanics inspected the top handler and found nothing wrong with it. TR at 121-22 and 129-130.

The following day, Claimant said she had pain and tightness in her neck, back and both shoulders. CX 6, p. 61. She testified that she felt "horrible" and she hurt everywhere. TR at 226. Claimant picked up the medical authorization forms that authorized her to see a doctor, and her daughter drove from the Bay Area to Long Beach to take her mother back to Northern California to see Dr. Meyers. TR at 227, 230-31; CX 6, p.62.

Kwang Chen

Mr. Chen was the superintendent in charge of Employer's yard/gate operations when Claimant was injured on April 15, 2002. He testified that he received a radio call informing him of the incident and he arrived on the scene immediately after the incident. TR at 116-17.

On arrival at the scene of the accident, Mr. Chen found a "normal pile" or nothing abnormal, no damage to equipment or anything looking any different than any normal day. TR at 117. He observed the UTR and the bomb cart utilized by Claimant on April 15, 2002 and noted nothing abnormal and normal wear and tear. TR at 118-19. He stated that he did not observe any bending at the end of the bomb cart. TR at 126. He also stated that there were no springs on the ground and that if the bomb cart springs had been somehow knocked off the bomb cart that he would expect there to be sparks from metal dragging on the ground due to the driving cart with missing springs. TR at 119. Mr. Chen also testified that he observed the container involved in the April 15 incident and did not notice anything abnormal and Employer's mechanics reported that the top handler involved in dropping the container involved in the incident was inspected and determined to be "fine" after inspection. TR at 120-22.

Mr. Chen further testified that he completed a report of the incident on April 16, 2002 stating that the container fell two to three feet onto the bomb cart on April 15, 2002 based on the statements of Manny, a clerk working at the pile where the container fell and Saul Laurel, the walking boss immediately supervising Claimant. TR at 123-24, 132-33; EX 27 at 262-63. Mr. Chen credibly testified that based on his experience working in the yard at Employer, he had observed a container falling eight to ten feet onto a bomb cart and the force of the falling container flipped the UTR up. TR at 124-25. In this case, there is no evidence that Claimant's

bomb cart flipped her UTR up and Claimant did not report that the UTR had flipped up. TR at 125.

Mr. Chen also testified that either he or Claimant's walking boss, Saul or Sal Laurel, arrived at the accident scene shortly after the incident occurred, he saw Claimant inside the UTR and asked Claimant: (1) if she was okay; (2) if she was injured; and (3) if she needed medical attention. TR at 117. Claimant responded by telling either Mr. Chen or Mr. Laurel that she was fine and able to continue to work and did not report that she had hit her head. *Id* and TR at 132, 151. Mr. Chen next testified that he gave Claimant his card and asked her to call him if she needed to go to a doctor or anything. TR at 117-18, 224. Mr. Chen stated that either he or Mr. Laurel did not observe any physical problem with Claimant at that time. TR at 121 and 137-152.

Mr. Chen spoke to Claimant the morning after the April 15 accident and she told Mr. Chen that she was hurt and needed to see a doctor and that she needed the forms from him. TR at 128. Mr. Chen gave Claimant an LS-1 Form which is an authorization to see a doctor. *Id*.

Dr. Joseph Meyers

Dr. Meyers is a board-certified orthopedic surgeon and a medical evaluator who is in private practice. Dr. Meyers graduated from Meharry Medical College in Nashville, TN in 1962. Since 1971, Dr. Meyers has practiced medicine in Daly City and Crescent City. Dr. Meyers testified at trial on January 23, 2004.

As referenced above, in January 1998, while Claimant was working as a postal carrier for the U.S. Postal Service, a pit bull charged at her and she jumped onto and then fell off the hood of a car. Dr. Meyers treated Claimant for this incident on January 13, 1998 for discomfort in her lower back and thoracic region. On February 9, 1998, Dr. Meyers' started mentioning that Claimant has cervical spine pain ("She is somewhat improved, with less pain in the cervical spine.."). EX 19, p. 82. Previously, Dr. Meyers noted that she had no cervical pain. EX 19, p. 77-78. Dr. Meyers saw Claimant for this injury until June 17, 1998, at which time he released her back to work. EX 19, p. 127.

Following Claimant's April 15, 2002 accident, Dr. Meyers examined Claimant 27 times between April 17, 2002 and March 16, 2004 (April 17, 2002; April 24, 2002; May 1, 2002; May 8, 2002; May 14, 2002; May 21, 2002; June 4, 2002; June 19, 2002; July 10, 2002; July 24, 2002; September 3, 2002; September 25, 2002; December 3, 2002; December 18, 2002; January 6, 2003; January 14, 2003; February 11, 2003; March 5, 2003; March 18, 2003; April 2, 2003; April 16, 2003; May 13, 2003; June 9, 2003; July 23, 2003; August 6, 2003; December 10, 2003; March 16, 2004) CX 13, p. 89-127.

Dr. Meyers first examined Claimant on April 17, 2002, two days after her injury. Claimant primarily complained of pain in the cervical spine, both shoulders and in the upper thoracic spine, and of headaches. She did not complain of any pain in the lumbosacral region. CX 13, p. 89. Dr. Meyers' diagnosed Claimant with an acute cervical spine sprain, acute thoracic spine strain, acute lumbosacral strain, contusion and strain of both shoulders and impingement

syndrome of the right shoulder. CX 13 at 91. He prescribed Skelaxin 400 mg and Celebrex 200 mg, and to take hot showers twice daily. CX 13 at 91.

In her second visit to Dr. Meyers on April 24, 2002, Claimant continued to complain of pain in the cervical and thoracic region and also began to complain of lower back pain. Dr. Meyers suggested Claimant try physical therapy for her spine and both shoulders. CX 13, p. 93.

Claimant's seventh and eighth visits to Dr. Meyers were on June 4, 2002 and June 19, 2002, respectively. At those visits, Dr. Meyers noted that Claimant was complaining of significant pain in the lower back and less so in the cervical spine. She had no complaints of upper or lower extremity radicular pain. In between these two visits, Claimant saw Dr. Sturtz on June 17, 2002. At that visit, however, Claimant did complain about radiation into both shoulders and arms, left proximal forearm pain and tingling in the left hand affecting all of her fingers. CX 16, p. 149.

At the next examination on July 10, 2002, Dr. Meyers again noted in his report that Claimant "has no radicular symptoms in the upper left extremity." CX 13, p. 103. However, a few paragraphs later, Dr. Meyers stated that that Claimant has "persistent radicular symptoms involving the left upper extremity." CX 13, p. 103. In the same report, Dr. Meyers also stated that Claimant had been having "increased numbness and tingling, involving the thumb, index and middle fingers of the right hand." CX 13, p. 103. This was the first mention of numbness and tingling in the right hand.

On July 24, 2002, Dr. Meyers again noted Claimant was experiencing numbness and tingling in the right hand and fingers, and that she had "radicular symptoms into the right upper extremity from her neck." CX 13, p. 104. At the hearing, Dr. Meyers said that these statements about right hand numbness and tingling and upper right extremity pain were incorrect; he was referring to her left hand. TR at 90-91. Dr. Meyers referred Claimant to Dr. Cohen at this visit. CX 13, p. 104.

Dr. Meyers testified at hearing that based on the negative EMG testing and the absence of objective findings, he did not believe that Claimant needed surgery. TR at 70. Moreover, Dr. Meyers opined that even though Claimant had left-upper extremity radicular symptoms with her occasional complaints of tingling and numbness, Claimant did not have any consistently absent reflexes in the left-upper extremity and she did not have any consistent weakness of the left-upper extremity musculature to recommend surgical intervention. TR at 70-71.

On September 3, 2002, Dr. Meyers noted that Claimant had pain in the neck and lower back. CX 13, p. 105. He also found that she had no gross motor or sensory deficit to the upper extremities nor did she have motor or sensory deficit to the lower extremities. CX 13, p. 105. Dr. Meyers recommended Claimant to continue her exercise and medication regime. CX 13, p. 105. Again three weeks later on September 25, 2002, Dr. Meyers found, based on his examination of Claimant, that her pain was centralized in her neck and lower back, and that she was having no gross motor or sensory deficits to the upper extremities nor did she have motor or sensory deficit to the lower extremities. CX 13, p. 106. Dr. Meyers recommended Claimant to continue her exercise and medication regime. CX 13, p. 107.

The next time Dr. Meyers examined Claimant on December 3, 2002, Dr. Meyers noted that Claimant continued to complain about pain in her cervical spine and now complained about tingling and numbness if her left upper extremity. CX 13, p. 108. Dr. Meyers recommended that Claimant try Neurontin 300 mg tid, and continue her therapy and home exercises. CX 13, p. 108.

On December 18, 2002 Dr. Meyers noted that Claimant had intermittent upper extremity radiculopathy. CX 13, p. 109. Dr. Meyers recommended that Claimant continue taking Neurontin 300 mg tid, and doing her exercises. On January 6, 2003, Dr. Meyers stated that it was "recommended that we add Neurontin to her medication, to see if this would afford her relief. She is to take the 100 mg tablet tid." CX 13, p. 112. Presumably, Claimant was already taking Neurontin since Dr. Meyers recommended 300 mg tid back on December 3, 2002.

On January 14, 2003, Dr. Meyers stated that Claimant had numbness and tingling in her upper extremities. CX 13, p. 113.

In his December 18, 2002 and January 14, 2003 reports, Dr. Meyers failed to indicate if the upper extremity pain was in Claimant's right or left upper extremity. On February 11, 2003, Dr. Meyer's reported that Claimant's numbness and tingling was bilateral, and that she had right upper extremity radicular. At the hearing when asked about this report, Dr. Meyers said that "she never had any really persistent complaints that I could recall, other than looking at this, with her right-upper extremity." TR at 95-96.

By April 2, 2003, Dr. Meyers stated that Claimant had no upper extremity radicular pain, no thoracic spine complaint, and some intermittent radicular pain. CX 13, p. 118.

On June 9, 2003, Dr. Meyers noted that the Claimant continued to improve and that he would expect her to "continue to improve steadily." CX 13, p. 122.

On August 6, 2003, Dr. Meyers gave Claimant a release to return to work; the release recommended that she apply for the dock preference board because of her limitation for overhead reaching, pulling, twisting or reaching. CX 13, p. 125. Claimant testified that she decided to go back to work in September 2003. TR at 245.

Claimant applied to the Preference Board for clerk work under the Americans With Disabilities Act ("ADA") and qualified. TR at 246-47. Claimant testified that the special accommodations made for her included her not having to lift over 10 pounds and her not having to stand for eight hours such that she had the option of standing or sitting. TR at 247-48. Claimant also testified that her continuous problem is that she cannot stand and sit for prolonged periods. TR at 247. At hearing on January 27, 2004, however, I observed Claimant sitting for at least two hours with no apparent discomfort or pain and virtually no shifting in her seat.

Claimant did not return to work until October 27, 2003. TR at 252. At or about that time, Dr. Meyers gave Claimant a full-time work release with no restrictions TR at 73-74. He testified that he did this understanding that Claimant could not do longshoreman work but rather in hope with Claimant that she would get on the dock preference board. *Id*.

Dr. Meyers saw Claimant again on December 10, 2003. At hearing, Dr. Meyers said that he thinks that Claimant reached MMI on that last visit, December 10, 2003. TR at 72.

The last time, Dr. Meyers saw Claimant was on March 16, 2004. Claimant still complained of ongoing discomfort in her cervical spine with intermittent radiation of pain into the left arm. CX 40, p. 396. Dr. Meyers found some tenderness to palpation in the midline C6-7, and motion of the cervical spine including flexion and extension to 20 degrees and left and right lateral flexion and rotation to 20 and 60 degrees. CX 40, p. 396. He "encouraged her to keep working", taking her medicines and exercising. CX 40, p. 396.

Dr. Howard Sturtz

Dr. Sturtz is also a board-certified orthopedic surgeon. He received his medical degree from Downstate Medical Center in 1960. Dr. Sturtz is a consultant for the Social Security Administration and the U.S. Department of Labor and an independent and qualified medical examiner for the State of California's Division of Industrial Accidents. CX 15, p. 147. He testified that he averages about 10-15 independent medical evaluations over the course of a year in the longshore area always for the defendant and never for claimants. TR at 169-70.

Dr. Sturtz saw Claimant in an orthopedic consultation on June 17, 2002. Dr. Sturtz reviewed Dr. Meyer's evaluations and conducted his own physical examination of Claimant. Dr. Sturtz noted that an injury report from Pacific Maritime Association listed four injuries between 1994 and 1998, but that none of the injuries affected the neck, shoulders, or back. CX 16, p. 151. A review of Claimant's medical records during that same time period shows that a May 5, 1994 accident affected Claimant's left hand and a January 1998 accident affected Claimant's neck, back and shoulders. EX 17, p. 50; EX 19, p. 70-82.

Claimant complained to Dr. Sturtz of neck pain, lower back pain, headaches, radiation into both shoulders and arms, left proximal forearm pain, and tingling in the left hand affecting all of her fingers. She was not sure if she had upper back pain. CX 16, p. 149. Upon examination of Claimant, Dr. Sturtz found that Claimant's neck was tender to light touch and that she allowed 0 to 5 degrees of range of motion in every direction. Dr. Sturtz also found that Claimant's shoulders were tender to light touch, and abducted to only 90 degrees with complaints of pain. Claimant's back was also tender to light touch, and Dr. Sturtz opined that back motions are "actively restricted." He found no motor reflex deficits in the upper or lower extremities. CX 16, p. 150.

Dr. Sturtz concluded that Claimant displayed "a very unnatural performance" during the physical examination. CX 16, p. 154. He found her to be "excessively" tender to light touch and actively restricting her ranges of motion during the examination but not at other times. CX 16, p. 154. Dr. Sturtz opined that Claimant did not sustain "any significant injuries, if any, as a result of this episode" and that it was "medically unreasonable" that she would have ongoing symptomatology regarding multiple areas as a result of this episode. CX 16, p. 154. He said that

Claimant was "fully recovered" and that she had reached a level of maximum medical improvement within a day or two after the accident. CX 16, p. 154-155.

Dr. Sturtz saw Claimant a second time on December 9, 2003, at the request of Employer. Claimant told Dr. Sturtz that there had been no change in her general health; she complained of headaches, neck pain, shoulder pain, back pain and radiation into and numbness of the left hand. CX 16, p. 156-157. At the time, she was taking Naprosyn, Vicodin at night and "Bayta." CX 16, p. 157. Upon examination, Dr. Sturtz found there to be no tenderness or spasm in her neck or shoulders. He found her lower back tender to light touch but found no spasm. CX 16, p. 157. Dr. Sturtz performed a number of tests on Claimant with inconsistent results that verified his opinion that Claimant had no objective proof to support her symptoms. TR at 163-66.

Dr. Sturtz reaffirmed the opinions he espoused in his June 17, 2002 evaluation. He believed Claimant sustained only minor injuries and that she made a full and prompt recovery. He believed Claimant was being treated solely upon symptomatology without any objective findings. CX 16, p. 193. Further, Dr. Sturtz noted that he believed Dr. Meyers' various reports lacked accuracy and consistency. CX 16, p. 193. For example, Dr. Sturtz noted that Dr. Meyers' reports from June to December lacked any information about Claimant's shoulder pain, repeatedly referred to her right hand and shoulder when her pain was in her left hand and shoulder, and that he conducted incomplete examinations. CX 16 at 159-167. Dr. Sturtz also opined that Dr. Meyers' treatment of Claimant after the April 2002 injury was excessive. TR at 182-83.

Dr. Michael Cohen

Dr. Cohen, a neurologist, works at Peninsula Neurological Associates in Daly City. Dr. Cohen did not testify by trial or deposition but has submitted various reports. CX 21, p. 258-261. Dr. Meyers referred Claimant to Dr. Cohen. Dr. Cohen examined Claimant regarding the tingling she experienced in her upper left extremity on August 26, 2002.

Claimant testified that when she saw Dr. Cohen, she experienced a bad constant tingly feeling in her left arm and a real bad constant neck pain. TR at 235. Claimant testified that an injection from Dr. Cohen relieved her constant tingling in her left arm. TR at 236.

Upon examination, Dr. Cohen found that Claimant has "slight voluntary guarding with cervical spine movements." He found her cranial nerve examination and motor examination to be normal. The EMG and nerve conduction studies Dr. Cohen ran on both of Claimant's upper extremities were found to be within normal limits. CX 21, p. 260-61. Dr. Cohen concluded that despite Claimant's "prominent symptoms," the neurological examination and electrodiagnostic studies were within the normal limits, thus the etiology of the patient's symptoms were "not clear." CX 21, p. 260. He opined that "because of the associated neck pain, a cervical radiculopathy with atypical symptoms is most likely." CX 21, p. 260.

Dr. Cohen examined Claimant a second time on February 21, 2003. CX 21, p. 258. Claimant complained of worsening pain following the cervical block. Dr. Cohen found that

Claimant had good peripheral pulses and the detailed examination came out normal. Dr. Cohen suggested Claimant increase her Neurontin. Based on Claimant's worsening symptoms and moderate to severe canal stenosis on the cervical MRI, he suggested that Claimant get a neurosurgical opinion. CX 21, p. 258.

Dr. Catherine Mills

Dr. Mills did not testify by trial or deposition but provided a report about Claimant's August 27, 2002 MRI scan. Dr. Mills found Claimant's cervical alignment to be normal in alignment, size and signal without focal lesion. CX 23, p. 264. She also found "degenerative changes" seen with a moderate central disc protrusion at C3-4 , a small disc protrusion at C4-5 and a small central disc protrusion at C5-6. CX 23, p. 265-266.

Dr. Robert Ansel

Dr. Ansel is Board-certified in neurology and psychiatry. Dr. Ansel graduated from Albany Medical College in New York in 1964. Since 1971, Dr. Ansel has been a practicing neurologist in Oakland.

Claimant was referred to Dr. Ansel on July 30, 2002. Dr. Ansel first examined Claimant on September 9, 2002, four and half months after Claimant's injury. Dr. Ansel also reviewed in its entirety a series of evaluations and treatments performed by Dr. Joseph Meyers from April 17, 2002 through June 19, 2002. He also reviewed a copy of the EMG and nerve conduction studies performed by Dr. Cohen on August 28, 2002 as well as copies the MRI scan. CX 17, p. 195. Dr. Ansel noted in his report that Claimant acknowledged a previous lumbar spine injury following jumping on a car to avoid being bitten by a dog while working for the U.S. Post Office. CX 17, p. 196. She, however, denied any prior cervical complaints. CX 17, p. 196. Claimant did not tell Dr. Ansel about her 1992 cervical sprain following a beating, 1994 hand injury or 1998 cervical spine pain following the dog attack. CX 17, p. 217-218.

At the September 9, 2002 examination, Claimant complained to Dr. Ansel about pain, numbness and tingling in her left arm, pain at the base of her neck, headaches related to her neck pain, stiff shoulders, and an "achy" lumbar spine. CX 17, p. 196-197. In examining Claimant, Dr. Ansel reported that she had no limitation of mobility and no spasm or point tenderness in the cervical spine. CX 17, p. 198. He found that there was no winging of the scapula with normal shoulder movements and no spasm or point tenderness in the dorsal spine. CX 17, p. 198.

In examining Claimant's lumbar spine, Dr. Ansel's found no spasm, tenderness or any discomfort. CX 17, p. 198. Dr. Ansel found that Claimant had full and "pain-free" range of movements throughout both extremities, but also noted that Claimant complained of mild back discomfort during the upper extremities maneuvers. CX 17, p. 198. Dr. Ansel confirmed Dr. Mills reading of the MRI scan; the scan showed "pre-existing" degenerative changes and disc protrusion at C3-4, C4-5 and C5-6. CX 17, p. 200-201.

In his September 9, 2002 medical report, Dr. Ansel diagnosed Claimant with a cervical and to a lesser degree musculoskeletal strain. CX 17, p. 201. At trial, Dr. Ansel opined that the "anatomic changes noted and described in her cervical spine was a preexisting condition; however, the preexisting condition made her more susceptible, and her strains and sprains were, in fact, directly related to the injury sustained." TR at 346. Dr. Ansel further opined that his "findings on examination were limited to Ms. Moss' complaints of pain and discomfort.." TR at 343. Dr. Ansel found no objective findings to support Claimant's symptomology. TR at 343.

In his report, Dr. Ansel stated that Claimant's treatment and temporary disability to date have been reasonable and appropriate. CX 17, p. 200. He opined that Claimant had achieved maximum medical improvement as of September 9, 2002 and that she needed no further medical care or treatment besides stretching, exercise and, on occasion, anti-inflammatories or mild over the counter analgesics. CX 17, p. 200. In his September 9, 2002 report, Dr. Ansel believed Claimant could return to her usual and customary job. CX 17, p. 200. He commented that there was an "inconsistency" with Claimant's complaints and his physical examination and review of objective findings. CX 17, p. 201.

Dr. Ansel examined Claimant a second time on January 2, 2004, which is approximately three months after Claimant resumed working. Dr. Ansel had been deposed a few days earlier (December 31, 2003). Dr. Ansel reviewed Dr. Meyer's evaluations of Claimant, noted the January 8, 2003 cervical epidural steroid injection done by Dr. Szabo, and once again reviewed the August 27, 2002 cervical MRI examination and Dr. Cohen's electrodiagnostic study from August 26, 2002. CX 18, p. 203. Claimant told Dr. Ansel that her upper left extremity pain had improved, her lumbar and cervical spine pain fluctuated depending on her level of activity, and that she continued to have headaches originating from the neck pain.

Following a physical examination and evaluating Dr. Meyers' and Dr. Cohen's reports and studies results, Dr. Ansel concluded that he found "no evidence or documentation that Ms. Moss [had] clear-cut and persistent neurological deficits." CX 17, p. 207. He noted that Claimant's preexisting developmental arthritis and cervical spinal stenosis [was] likely contributing to her persistent symptoms…nonetheless, she has not demonstrated any objective findings to support cervical radiculopathy." CX 17, p. 208. He also stated that he would not have recommended a cervical epidural injection, and that he only recommended a self-procured exercise program. CX 17, p. 208. He maintained his original opinion that Claimant could have returned to her usual and customary job as of September 9, 2002. CX 17, p. 208.

Dr. Charles Szabo

Dr. Szabo works at Seton Medical Center in Daly City. Dr. Szabo did not testify by trial or deposition but has submitted a procedure report. CX 22, p. 262-263. Dr. Szabo saw Claimant on January 8, 2003 on the referral of Dr. Cohen and Dr. Meyers. CX 22, p. 262. Dr. Szabo administered a translaminar cervical epidural steroid injection with catheter placement. CX 22, p. 262. His pre and post-procedure diagnosis is cervical degenerative disk disease, neck pain and cervical radiculopathy. CX 22, p. 262.

Dr. Tony Wong

On April 16, 2003, Claimant's "regular" treating physician, Tony Wong, M.D., examined her for the purpose of a commercial driver fitness determination. TR at 252-53, 265-66. With her input and Dr. Wong's physical examination and qualification, Claimant renewed her commercial driver's license through April 17, 2005. TR at 250-53.

In reporting her health history, Claimant certified under penalty of perjury that she had no spinal injury or disease, no chronic low back pain, no head/brain injuries, no disorders or illnesses, nor any missing or impaired hand, arm, foot, leg, finger, toe. EX 24, p. 249. Claimant testified that nothing prevented her from using her left arm in April 2003. TR at 256-57.

Dr. Wong's physical examination findings state that Claimant was "qualified" ("qualified" means that the driver's condition appears within normal limits) in all categories, including "extremities-limb impaired," "spine, other musculoskeletal," and "neurological." EX 24, p. 252. Dr. Wong opined that Claimant was "qualified" with: (a) sufficient mobility and strength in her lower limb to operate truck pedals properly; and (b) sufficient grasp in her upper limb to maintain a truck steering wheel grip; and (c) normal tenderness and motion in Claimant's spine. *Id*.

Claimant testified that despite the April 3, 2003 DMV Medical Examination Report (EX 24 at 249-252, Claimant did not feel that she was able to commercially drive in April 2003 and that she told Dr. Wong that she was not able to commercially drive. TR at 264-65. Yet, Claimant also testified that she did not think she was having any problems with a spinal injury or disease or chronic low back pain prior to April 16, 2003. TR at 259-60.

Dr. Peter Weber

Dr. Weber is a neurosurgeon who testified at trial on January 23, 2004. Dr. Weber examined Claimant on June 3, 2003 as a non-treating physician retained by Claimant. TR at 57; CX 19, p. 241. Claimant reported to Dr. Weber that she experienced muscle spasms and mechanical neck back pain as well as occasional and much less severe radiating left-hand tingling and rare weakness. CX 19, p. 241-242. Dr. Weber reviewed Dr. Cohen's EMG or electrical studies summary of findings dated August 26, 2002 and the MRI scan of Claimant's cervical spine dated August 27, 2002. CX 20, p. 247; CX 20, p. 245. The only past history indicated in Dr. Weber's June 3 report was that Claimant had hypertension, a hysterectomy, and a C-section. CX 19, p. 241. There was no mention of her previous back, shoulder or hand injuries pre-dating the April 2002 accident.

On June 3, 2003, Dr. Weber also conducted a neurological examination of Claimant. Claimant reported pain in her lower back, neck, and shoulders. EX 23 at 247. He found Claimant's cervical spine range of motion to be diminished in all directions, that there were bilateral cervical and lumbar paraspinious and trapezius muscle spasms, but no gross deformities of the cervical spine were visualized or palpated. CX 19, p. 241. The testing of any of Claimant's

muscle groups was limited by her effort. EX 23 at 248. Claimant demonstrated give-way weakness in testing of all muscle groups of the left side. CX 19, p. 242.

Dr. Weber found that the MRI showed degenerative changes, but no clear evidence of nerve root impingement or spinal cord compression. He diagnosed her with "muscle spasms and mechanical back and neck pain." CX 19, p. 242. At trial, Dr. Weber said those spasms "could be related to degenerative changes." TR at 56. He also testified that it was reasonable that Claimant's back muscle spasms were due to the April 15, 2002 accident based on the limited history communicated to him by Claimant. TR at 60; EX 23 at 247. In his report, Dr. Weber opined that Claimant's symptoms were "out of proportion to any radiographic findings." EX 23 at 248. At trial, Dr. Weber limited that statement, saying that he was specifically referring to her arm pain despite Claimant's only mention of pain being to her lower back, neck, and shoulders. TR at 56; EX 23 at 247.

Dr. Weber concluded that he saw "no clear role for surgical intervention at this time" and he released her from his care. CX 19, p. 242. He recommended that Claimant continue with the "conservative measures" she was already doing such as medication, physical therapy and cervical epidural steroid injections. He also recommended gentle chiropractic treatments, acupuncture, massage, stretching and home traction as potential alternative treatments. CX 19, p. 242. Dr. Weber prescribed Robaxin, a muscle relaxing medication, Naprosyn, an anti-inflammatory medication for pain, and a neck traction device. CX 20, p. 247.

Dr. Pamela Pierce-Palmer

Dr. Pierce-Palmer is an Associate Professor in Anesthesia and Medical Director at UCSF/Mount Zion Pain Management Center. Dr. Pierce-Palmer saw Claimant on December 2, 2003. CX 24, p. 268-269. Claimant did not report to Dr. Palmer any previous back injuries, including her March 1993 and January 1998 back injuries. CX 42, p. 447-448.

Claimant indicated to Dr. Pierce-Palmer that her pain is most significant in her back; she complained of localized aching pain that was always present. Claimant said her neck pain was intermittent and aggravated with certain twisting movements. She said she no longer had cervical radiculopathy symptoms. CX 42, p. 440.

Based on a physical examination of Claimant, Dr. Pierce-Palmer found Claimant's back shows limited flexion to approximately 60 degrees, limited rotation and lateral bending and pain with extension. CX 24, p. 269. Dr. Pierce-Palmer diagnosed Claimant with facet joint arthropathy in the lumbar region. CX 42, p. 432. Dr. Pierce-Palmer recommended facet joint injections in the lumbar region at the next available appointment, switching from Naprosyn to Bextra 20 mg to reduce side effects, and switching from Neurontin to Topamax 100 mg and slowly increasing the dosage to 400 mg. CX 24, p. 269.

On January 28, 2004, Dr. Pierce-Palmer saw Claimant again. Claimant continued to complain of some cervical pain and lumbar pain. CX 41, p. 399. Dr. Piece-Palmer administered bilateral facet injections at L3-4 and L4-5 (four total injections). CX 41, p. 398. Dr. Palmer saw

Claimant on March 29, 2004. Claimant reported almost complete relief of lumbar pain following the facet injection. CX 42, p. 437. But she complained now of more cervical pain. Dr. Pierce-Palmer recommended facet injections in the cervical spine, but Claimant, stated that she did not want to pursue interventions in that area and that she just wanted medical management. CX 42, p. 441. As an alternative, Dr. Pierce-Palmer instead suggested Lidocaine patches on the cervical region. CX 42, p. 441.

## DISCUSSION

The parties dispute whether and when Claimant reached maximum medical improvement (MMI).

### Credibility

The following factual findings and conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, argument of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. See *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 *reh'g denied*, 391 U.S. 929 (1968); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

#### *Claimant*

In the instant case, Claimant's testimony is inconsistent and contradicted by other evidence in the record, undermining her credibility as to the extent of her April 15, 2002 work-related injury. For example, Claimant testified that she is unable to return to her prior work as a UTR driver because she is unable to sit for extended period of time. TR at 247. At hearing, however, I observed Claimant sitting for prolonged periods of at least two hours with no apparent discomfort or pain and virtually no shifting in her seat.

In addition, while Claimant currently complains that she cannot return to her prior work as a longshore person due to the April 15, 2002 work-related injury, she qualified for renewal of her commercial driving license in April 2003 and wrote, under penalty of perjury, that she had no pre-existing spinal injury or disease, no low back pain, and further testified that nothing prevented her from using her left arm at that time. TR at 256-57. She further testified that that she did not think she was having any problems with a spinal injury or disease or chronic low back pain at any time prior to April 16, 2003. TR at 259-60; EX 24 at 249. Moreover, Claimant's treating physician, Dr. Wong, examined her and found Claimant qualified to drive a commercial vehicle without restrictions in April 2003. EX 24 at 252. There is no credible evidence showing that Dr. Wong did not perform a physical examination as required by California law for Claimant to renew her commercial driving license. Also, Claimant's statement that she told Dr. Wong that

she did not feel capable of doing commercial driving as of April 2003 when she attended her physical examination with him is not credible. See TR at 264-65.

In addition, the overwhelming medical evidence presents no objective evidence to justify Claimant's subjective complaints and more than one physician including Drs. Sturtz, Cohen, Wong, and Ansel found Claimant's subjective complaints and/or efforts in testing less than credible when compared to the lack of objective evidence and "normal" test results. Furthermore, at several medical examinations, Claimant denied any pre-existing problems to her low back, cervical spine, or left arm despite conflicting evidence of disability claims in 1992- 94 and 1998. See TR at 163-66 and 343; CX 13 at 106; CX 16 at 154-55, 193; CX 17 at 196-201, 207-08 and 217-218; CX 19 at 241; CX 21 at 260-61; CX 22 at 262; CX 23 at 264;CX 42 at 432 and 447-48; EX 17 at 25-37, 40-44, and 50; EX 19 at 82, 119, and 127; EX 23 at 248.

Also, the day following the April 15, 2002 incident, Claimant testified that she was hurting "everywhere" and was offered medical attention to any physician in the Long Beach, California area. TR at 226. Rather than seeing a doctor in Long Beach, however, Claimant traveled to Northern California, a car trip of over 8 hours, to see Dr. Meyers, the physician who had treated her in the past following multiple injuries. I find it unbelievable that if Claimant's April 15, 2002 work-related injuries were as severe as she testified, she could have endured the long car ride rather than seek immediate local medical assistance from a physician in Long Beach. Furthermore, even after Claimant saw Dr. Meyers for her work-related injuries on April 17, 2002, he treated her only with muscle relaxants and told her to take hot showers. TR at 232.

Lastly, Claimant's version of events taking place on the date of her injury in this case is inconsistent and not credible when compared to the events referenced in the credible testimony from Employer superintendent Kwang Chen and the report generated from the incident. See TR at 116-33, 214-15, 222-23, 137-52 and 320; EX 27 at 262-63. For example, Mr. Chen testified that he had experience with containers and bomb carts that had been involved in falls in excess of 7 feet as testified by Claimant and there was no evidence of severe damage to the UTR, container, or bomb cart involved in the incident other than Claimant's non-credible testimony. Claimant's testimony paints a picture that Employer tried to cover-up the incident and forced her to complete her shift on April 15, 2002 in pain while Mr. Chen testified that Claimant indicated to other Employer employees that she was not hurt and did not complain of pain until the next morning. the evidence shows that Claimant did not take any medication the night of the incident. See TR at 225-26.

Based on the foregoing inconsistencies and contradictions in Claimant's testimony and behavior, I conclude that she was not a credible witness and accord little weight to her testimony concerning her recovery from the April 15, 2002 injury and her back and arm pain and any relationship between that pain and her 2002 work-related injury.

*Dr. Meyers*

Dr. Meyers' testimony and his medical reports are also riddled with inconsistencies and contradictions that cause me to disregard his professional opinions despite his position as being Claimant's other treating physician since September 8, 1997. See TR at 75. Throughout this case, Claimant and Dr. Myers have attempted to ignore the fact that prior to Claimant's April 2002 work-related injury, she suffered one or more serious injuries to her neck, cervical spine, lower lumbar spine, and left arm. See EX 17 at 35; 37 40, 44, 50, 70, 80. and 82. Dr. Meyers denied under penalty of perjury that Claimant suffered an injury to either her neck or cervical spine when she was chased by a pit bull while delivering mail in 1998. TR at 75-76. Dr. Meyers own medical report dated February 9, 1998, however, specifically references Claimant's neck symptoms and states that Claimant "is somewhat improved, with less pain in the cervical spine and lower back." EX 19 at 82. His other reports later in 1998 routinely mention muscle spasms, tightness, and stiffness in Claimant's neck and cervical spine. EX 19 at 85 an 99.

In addition, Dr. Meyer was not credible when he testified that his medical reports are simply inaccurate when referencing Claimant's 1998 cervical spine and continuous right hand and arm problems and that they should not reference these problems at all or that he meant to report Claimant's "left" hand , arm or fingers instead of her "right." See TR at 76, 90, 91 and 99-100; EX 19 at 82,85, 99, 212 and 217. Dr. Meyers did admit that his practice is very busy seeing 30-35 patients a day for 15-20 minutes each and sometimes his report dictation gets put behind other more pressing matters and that transcription mistakes do occur. TR at 99-101. See also CX 16 at 159-67 and 193. Consequently I do not rely on the accuracy of any of Dr. Meyers' medical reports concerning Claimant.

Also, Dr. Meyers' opinions ignore Claimant's pre-existing back and arm injuries and do not either incorporate them into his opinions or distinguish his opinions of Claimant ongoing work-related injury from her non-work-related degenerative disk disease. See TR at 56; CX 17 at 200-01; CX 22 at 262; CX 23 at 265-66; and CX 42 at 432.

Finally, I find the frequency that Claimant saw Dr. Meyers from April 2002 through March 2004, 27 times, excessive and unreasonable at $145-$165 per visit and Claimant saw Dr. Meyers sometimes four times per month and averaged two visits a month for most of 2002 and 2003. CX 13 at 89-127. Much the same, I agree with Dr. Sturtz' similar characterization of Dr. Meyers' excessive treatment. TR at 182-83. I find Dr. Meyers' financial interest in seeing Claimant prevail in this case as further diminishing his credibility.

For these reasons, Dr. Meyers' medical opinions are rejected entirely as they are unsupported by objective medical evidence applicable to the facts of this case and I find the fact that he has a financial interest in the outcome of this case blurs his own objectivity.

*Dr. Sturtz*

I reject Dr. Sturtz opinion only with respect that he opines that Claimant reached MMI within a few days of the accident. The accident is undisputed, and it is unreasonable to believe that upon such an accident, that Claimant would be "fully recovered" within a day or two. CX 16, p. 154.

*Dr. Weber*

I found Dr. Weber to be a credible witness for the most part but reject his opinion that it was reasonable that Claimant's back spasms were due to the April 15, 2002 accident. See TR at 60. I reject this primarily because this opinion was clearly based on the limited medical history given to Dr. Weber and the medical evidence shows that Claimant had substantial pre-existing injuries to her cervical and lumbar spine and her left upper extremity. TR at 60; EX 17 at 35, 37; 40, 44, and 50; EX 19 at 82 and 119.

Nature and Extent of Disability

A disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." 33 U.S.C. § 902(10). Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by the claimant. 33 U.S.C. § 908(c) (21); *Trask v. Lockheed Shipbuilding & Const. Co*, 17 BRBS 56, 59 (1985). When evaluating a disability, I will consider the claimant's age, education, and employment history, as well as availability of appropriate employment. *Amer. Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

An employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes, but if such injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Claimant may have previous work-related injuries that never resolved. On March 8, 1993, Claimant injured her lower back while working as a letter carrier. EX 17, p. 40. On May 5, 1994, the Claimant injured her left hand at work, which required her to be off work for more than a year. EX 17, p. 50. In January 1998, while working as a letter carrier, Claimant injured her back while trying to avoid a dog. EX 19, p. 70. Claimant complained of experiencing pain in her shoulder as a result of that incident. EX 19, p. 80.

Claimant's treating physician for the January 1998 incident was also Dr. Meyers, who said that he did not know whether Claimant's back injuries from that earlier accident ever resolved. TR at 84. An August 27, 2002 MRI scan showed "degenerative changes" along with a moderate central disc protrusion at C3-4 , a small disc protrusion at C4-5 and a small central disc protrusion at C5-6. CX 23, p. 265-266. Dr. Ansel also opined that the "anatomic changes noted and described in her cervical spine was a pre-existing condition; however, the pre-existing condition made her more susceptible, and her strains and spasm were, in fact, directly related to the injury sustained." TR at 346.

*Nature of Disability*

Claimant contends that her condition is temporary because her treatment is ongoing and active. Employer does not dispute that Claimant's injury was temporary for a limited time period immediately following the April 15, 2002 injury. Employer and Claimant, however, disagree when and if Claimant reached maximum medical improvement ("MMI").

Claimant is seeking temporary total disability from July 3, 2002 through October 26, 2003, the day she returned to work. Claimant also claims she has not yet reached MMI by October 26, 2003. In contrast, Claimant's treating physician, Dr. Meyers believed Claimant reached MMI on December 10, 2003. TR at 72.

Employer argues that the April 17, 2002 MMI date of Dr. Sturtz should be used; Dr. Sturtz believes Claimant reached MMI within a day or two after the accident. CX 16, p. 155. Presumably, Employer is arguing that Claimant is entitled to no further payments after July 3, 2002 since Employer paid temporary disability to Claimant through July 3, 2002. In the alternative, Employer argues that if Dr. Sturtz's MMI date is not followed, Dr. Ansel's September 9, 2002 MMI date should be used.

Generally, in determining this issue, the opinion of the claimant's treating physician is to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." See *Amos v. Director*, OWCP, 153 F.3d 1051, 1054 (9th Cir. 1998), amended by 164 F.3d 480 (9th Cir.), cert.denied sub nom. *Sea-Land Service, Inc. v. Director*, OWCP, 528 U.S. 809 (1999); *Pietrunti v. Director*, OWCP, 119 F.3d 1035, 1043 (2nd Cir. 1997). I, however, reject Dr. Meyers December 10, 2003 MMI date because of credibility issues referenced above, the lack of objective findings, and the countervailing conclusions of Drs. Ansel, Cohen, Weber, Szabo, Wong, and Pierce-Palmer, all of who opined that either there was no objective evidence connecting Claimant's continued left arm and back complaints to her work-related injury or that her back problems are caused by her degenerative disk disease. See CX 17 at 200-01, 207-08; CX 19 at 242, 247-48; CX 21 at 260-61; CX 22 at 262; CX 42 at 432; EX 24 at 252. .

Dr. Meyers' ongoing treatment of Claimant was based on her subjective complaints of pain and is not supported by the objective findings of diagnostic tests. On August 26, 2002, Dr. Cohen, a neurologist, examined Claimant. He conducted EMG and nerve conduction studies on Claimant's upper extremities and found that they were within normal limits. CX 21, p. 258. An August 27, 2002 MRI scan also did not reveal any significant problems; there was a moderate central disc protrusion at C3-4, a small disc protrusion at C4-5 and a small central disc protrusion at C5-6. CX 23, p. 265-266. Dr. Ansel opined that these were degenerative changes. CX 17, p. 200. On June 3, 2003, Dr. Weber, a neurosurgeon, reviewed the MRI scan and examined Claimant. He concluded that the MRI scan showed degenerative changes and "no clear evidence of nerve root impingement or spinal cord compression." CX 19, p. 242. Dr. Weber also concluded that he saw "no clear role for surgical intervention." CX 19, p. 242.

I find Dr. Ansel's opinions more persuasive than Dr. Meyers' rejected opinions. Dr. Ansel examined Claimant on September 9, 2002, four and half months after Claimant's injury. In addition to conducting a physical examination of Claimant himself, Dr. Ansel reviewed in its entirety a series of evaluations and treatments performed by Dr. Joseph Meyers from April 17,

2002 through June 19, 2002 as well as a copy of the EMG and nerve conduction studies performed by Dr. Cohen on August 28, 2002 and a copy the MRI scan. CX 17, p. 195. Based on all of this information, Dr. Ansel concluded that Claimant did sustain an injury, which he diagnosed as a cervical and to a lesser degree musculoskeletal strain. He thought that the treatment of Claimant up to that point was reasonable and appropriate but that she had reached MMI as of that date. Dr. Ansel concluded that Claimant's condition had resolved to the point that she could return to her usual customary job as of September 9, 2002. CX 17, p. 200 & 208.

Despite the fact that Claimant received further treatment such as a cervical epidural steroid injection on January 8, 2003 and bilateral facet injections at L3-4 and L4-5 on January 28, 2004, there is no medical evidence or credible opinion indicating that these injections will cure her underlying condition, and rather will only address the symptoms of her degenerative disc condition. See, e.g. *Bunge Corp. v. Carlisle and T. Micahel Kerr, Deputy Asist. Sec.*, OWCP, 227 F.3d 934 (7th Cir. 2000).

As referenced above, I reject Dr. Sturtz opinion that Claimant reached MMI within a few days of the accident. The accident is undisputed, and it is unreasonable to believe that upon such an accident, that Claimant would be "fully recovered" within a day or two. CX 16, p. 154.

*Extent of Disability*

Under the Act, a claimant is presumed to be totally disabled where the claimant establishes an inability to return to the claimant's usual employment. *Manigault v. Stevens Shipping Co*., 22 BRBS 332, 333 (1989); Elliot v. C & P Tel. Co., 16 BRBS 89, 91 (1984). If the claimant invokes this presumption, the burden shifts to employer to establish the availability of suitable alternate employment that the claimant is capable of performing. *Bumble Bee Seafoods v. Director*, OWCP, 629 F.2d 1327 (9th Cir. 1980); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, the employer must identify specific positions which are realistically available to the claimant and comport with the claimant's physical restrictions. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods v. Director*, OWCP, 629 F.2d at 1330. Even if the employer succeeds at establishing suitable alternate employment, the claimant may still prevail by showing an inability to secure employment despite a diligent effort. *Palomdo v. Director*, OWCP, 937 F.2d 70, 73 (2d Cir. 1991).

To invoke the presumption of total disability, Claimant need not establish that she cannot return to any employment, but only show that she is unable to return to her former employment as a UTR driver. *Elliot*, 16 BRBS at 89; *Ramirex v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982) ("usual employment" is the claimant's regular duties at the time of the injury.) Employer asserts, based on Dr. Sturtz's opinion, that Claimant was fully capable of performing all of her prior job activities without any restrictions. CX 16, p. 155. In the alternative, Employer relies on Dr. Ansel's opinion, to argue that Claimant was able to return to her usual and customary job on September 9, 2002. CX 17, p. 201.

In contrast, Dr. Meyers, Claimant's doctor, did not recommend Claimant to return to work until August 6, 2003, and he suggested she only apply for clerk positions on the dock

preference board because of her limitation for overhead reaching, pulling, twisting and reaching. CX 13, p. 125. Claimant returned to work as a clerk through the dock preference board on October 26, 2003, three months after Dr. Meyers' recommendation.

For reasons stated above, I find Dr. Ansel's findings to be the most credible. Therefore, I find that Claimant was able to perform her usual job duties beginning on September 9, 2002 without restrictions. Accordingly I conclude that Claimant did not meet the presumption of total disability for the time period she contends (through October 26, 2003).

Compensation

For total disability, whether temporary or permanent, Claimant is entitled to compensation at the rate of 66 2/3 percent of her average weekly wage. 33 U.S.C. § 908(a)-(b). The parties stipulated that Employer paid Claimant temporary total disability from April 16, 2002 through July 3, 2002 at a maximum weekly rate of $966.08. Claimant's average weekly wage is $1,550.09 for a maximum compensation rate of $966.08. CX 9 at 82. I find Claimant is entitled to total disability at this rate for the period beginning July 4, 2002 through September 9, 2002.

Entitlement to Medical Expenses and Costs

Section 7(A) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment […] for such period as the nature of the inquiry or the process of recovery may require. 33 U.S.C. § 907(a). In order for medical expenses to be assessed against any employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial nature. 20 C.F.R. § 702.402*; Pardee v. Army & Air Force Exchange Serv.*, 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Claimant carries the burden to establish the necessity of such treatment rendered for her work-related injury. See generally *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc.*, 21 BRBS 33 (1988).

Claimant seeks medical benefits and compensation for her outstanding medical expenses and costs to Dr. Meyers in the amount of $4,214.44 and a physical therapy bill in the amount of $5,114.34. Claimant also seeks that Employer be liable for medical care and treatment as required.

I find that Employer is liable for payment or reimbursement of all of Claimant's medical expenses from April 15, 2002 through September 9, 2002.

## ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer Maersk Pacific shall pay Claimant temporary total disability compensation of $966.08 per week from April 16, 2002 to September 9, 2002.

2. Employer Maersk Pacific is entitled to a credit for any compensation previously paid to Claimant.

3. Employer Maersk Pacific shall provide such medical treatment as the nature of Claimant's work-related disability shall require and as described in the decision above from April 16, 2002 to September 9, 2002.

4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

5. The District Director shall make all calculations necessary to carry out this Order.

6. Counsel for Claimant shall within 20 days after service of this Order submit, to counsel for Employer and to the undersigned Administrative Law Judge, a fully supported application for reasonable costs and fees reduced by ninety percent (90%) for partially prevailing as to recovery of Claimant's disability benefits and medical expenses through September 9, 2002. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

**IT IS SO ORDERED**.

A

Gerald M. Etchingham
Administrative Law Judge

*San Francisco, California*